Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	

JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
NATIONAL REALTY COMMITTEE
NATIONAL MULTI HOUSING COUNCIL
NATIONAL APARTMENT ASSOCIATION
INSTITUTE OF REAL ESTATE MANAGEMENT
NATIONAL ASSOCIATION OF HOME BUILDERS

Summary

The commenters welcome the prospect of a rationally de-regulated market place for telecommunications services. Our customers -- our tenants and prospective tenants -- are demanding and enjoying this kind of deregulated market for many services, including of course, telecommunications services. Just as the telecommunications industry will be revolutionized, and ultimately improved, by competitive opportunities, our industry recognizes opportunities in increased customer sophistication and demands for new telecommunications services. Indeed, these demands will be (and already are) providing opportunities for our businesses to compete, one against the other, for market share. Our members aggressively market the characteristics of their properties, including telecommunications services. These

comments include a detailed discussion of the manner in which the real estate markets have responded and are responding to the proliferation of new telecommunications providers and the market forces that define this response (Point IV[A]).

The benefits to our customers -- consumers, if you will -- of the new competitive pressures unleashed by the efforts of Congress and the FCC are clear. As an industry, we are, therefore, at a loss to understand how the Federal Communications Commission could rationally interject a static regulatory regime at the intersection between our business and the telecommunications revolution. As set forth in these comments, constitutional and policy considerations weigh heavily against FCC-generated ground rules regarding the terms of telecommunications companies' access to and their highly profitable use of the real estate owned and managed by our respective members.

Any attempt by the Commission to mandate access to multiple-unit buildings by telecommunications providers -- whether under the guise of defining demarcation points or otherwise -- would lead to a taking of private property under the Fifth Amendment and would plainly exceed the Commission's statutory authority.

The U.S. Supreme Court has held in Loretto v. TelePrompTer Manhattan, 458 U.S. 420 (1982), that any regulation allowing a telecommunications provider to emplace its cables in, on, or over a private multi-tenant building is a governmental taking. Congress has not given the Commission the power of eminent

domain; Congress has passed no legislation that would allow the Commission to obligate the United States to respond in damages in the Claims Court for such a taking; and any such attempt by the Commission to impose such an unbudgeted fiscal liability on the federal treasury would violate the Anti-Deficiency Act of 1870, now 31 U.S.C. § 1341. A previous Commission attempt to force even carriers subject to the Communications Act to make their central office buildings available to competing carriers has been rebuffed in the courts. See Bell Atlantic v. FCC, 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994)(central office co-location). The Commission's power over non-carrier buildings is even less than the Commission's power over building in subject carriers' regulated rate bases. Moreover, the Commission would not be prepared to undertake the case-by-case adjudications necessary to fix just compensation for multitudinous takings. (Points II and III)

Aside from the straight-forward Constitutional and jurisdictional impediments to Commission regulation of access to private premises, other considerations suggest the benefit of an unregulated approach. First, the nation's limited but growing experience with unregulated (competitive) access providers makes clear that there is no need for the Commission to intervene on the access issue. Access is adequately regulated by the marketplace, and only the market will be flexible enough to respond to fast-changing consumer needs and technological developments. (Point IV[A]) Second, the Commission could not craft one-size-

fits-all regulations that would be superior to on-the-spot management's responsibility for particularized building safety and code compliance, occupant security. Indeed, effective management of the property, including allocation of limited duct and riser space and prevention of physical interference between competing providers is all demanded by the nature of the real estate business and its responsiveness to tenant concerns. (Point IV[B])

Accordingly, the Commission should (i) decouple the access-to-property and the demarcation-point issues, (ii) abandon any attempt to deal with the former, and (iii) adopt rules for the specific demarcation point and other wiring issues raised by the NPRM that reflect the realities of the diverse physical and market characteristics of multiple-unit buildings. (Points I and V)

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Introduction

The joint commenters, representing the owners and managers of multi-unit properties,[1] urge the Commission not to attempt to adopt rules purporting to confer on telecommunications providers any rights of access to private office buildings, condominiums, coöp buildings, and apartment buildings and complexes. To force the emplacement of telecommunications providers' wires and other

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1/ The joint commenters are the Building Owners and Managers Association International ("BOMA"), the National Realty Committee ("NRC"), the National Multi Housing Council ("NMHC"), the National Apartment Association ("NAA"); the Institute of Real Estate Management ("IREM"), and the National Association of Home Builders ("NAHB"). Founded in 1907, BOMA is a federation of ninety-eight local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America. NRC serves as Real Estate's roundtable in Washington for national policy issues. NRC members are America's leading real estate owners, advisors, builders, investors, lenders, and managers. NMHC represents the interests of more than six hundred of the nation's largest and most respected firms involved in the multi-family rental housing industry, including owners and managers of cooperatives and condominiums. NAA is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. The IREM represents property managers of multi-family residential office buildings, retail, industrial and homeowners association properties in the U.S. and Canada. NAHB is a trade association representing the nation's housing industry. NAHB's 185,000 member firms are involved in the development and construction of single family housing, the production and management of multi-family housing, and the construction and management of light commercial structures.

The joint commenters are also filing comments currently in the Commission's cable home wiring rulemaking in Docket No. 92-260 and, in a third filing, are submitting combined comments in this docket and Docket No. 92-260 regarding the regulatory flexibility analyses required by P.L. 96-354, 5 U.S.C. § 601 et seq.

facilities on the private property of others would constitute an unconstitutional taking in violation of the Fifth Amendment.

Moreover, the Commission lacks even colorable statutory authority to regulate the emplacement of wires, etc., in or on private buildings. The Commission's regulatory jurisdiction over demarcation points is limited to the offerings of common carriers under Title II and to the activities of cable operators under Title VI. Building owners are neither common carriers nor cable operators. Accordingly, the Commission should abandon any attempt to deal with access to private property and should reflect in its rules regarding demarcation and related issues the realities of the marketplace.

I. THE COMMISSION SHOULD DECOUPLE THE ACCESS-TO-PROPERTY ISSUE FROM THE DEMARCATION POINT ISSUES AND DEAL ONLY WITH THE LATTER.

The notice of proposed rulemaking herein (FCC 95-504) unnecessarily combines the two distinct issues of demarcation points and access to property. The notice has the matter backward to the extent that it assumes that placement of the demarcation point regulates access to private property. In fact, it is property access that may influence where demarcation points should be located for regulatory purposes.

A. The Commission's Demarcation Powers are Limited to Carriers and Cable Operators.

The Commission's powers to establish demarcation points for telephone and cable purposes are circumscribed by their respective statutory origins. These two statutory bases give the Commission no jurisdiction over the owners of private buildings:

1. The Commission's power over telephone wiring derives from its historic powers to regulate the offering of, and to prescribe the accounting for, telephone company services under Section 203 and 220 of the Act. The Commission's jurisdiction under Title II extends only to "common carriers exclusively . . ., and not even all of these." See Pennsylvania R.R. v. P.U.C. of Ohio, 298 U.S. 170, 174 (1936). The jurisdictional predicate for Title II jurisdictions is common carriage. Id. at 175. It goes without saying that building owners are not carriers, so the Commission's jurisdiction with respect to them is just that much more remote.

2. The Commission's power over cable wiring derives from its authority to prescribe rules for abandonment of "cable installed by the cable operator within the premises" of a subscriber. See Section 624(i) of the Cable Act, as added by Section 16(d) of the 1992 Act. Building owners and operators, as such, are not cable operators.

B. The Commission Lacks Authority over Building Owners and Managers Generally.

The scope of the Commission's jurisdiction is limited by Section 2(a) of the Act, 47 U.S.C. § 152(a), to interstate communication and "to all persons engaged ... in such communication .... [and] to all persons engaged ... in providing [cable] service, and to the facilities of cable operators which relate to such service, as provided in title VI." Accordingly, the Commission's exercise of jurisdiction under Title II with regard to telephone inside wire is limited to the bundling and booking of telephone companies' inside wire. Similarly, the Commission's exercise of jurisdiction with regard to cable wiring is limited to abandonment pursuant to Section 624(i) of the Cable Act, 47 U.S.C. § 544(i).

Building owners are neither carriers nor cable operators. If the Commission lacks jurisdiction over central office buildings on the regulated books of fully subject carriers, see Bell Atlantic v. FCC, supra, then *a fortiori* it lacks jurisdiction over the private property of building owners, who are neither carriers nor cable operators. More generally, the Commission lacks jurisdiction over real property ownership, even when used in a regulated activity. See Regents v. Carroll, 338 U.S. 586 (1950); Radio Station WOW v. Johnson, 326 U.S. 120 (1945); Bell Atlantic, supra.

Neither of the Commission's powers to determine demarcation points -- its power over the booking and unbundling of inside wiring and its power over cable abandonment -- confers on it any power to give private companies any access to the private property of others. Significantly, Section 259 and 271(c), added this year by P.L. 104-104 -- to the extent they do so -- apply only to local exchange carriers. Accordingly, there is no logical basis for the Commission to couple access-to-property issues with demarcation points. The Commission should decouple the access issue from the demarcation-point issues and deal only with the former.

II. COMMISSION-MANDATED ACCESS TO PRIVATE PROPERTY VIOLATES THE OWNERS' FIFTH AMENDMENT RIGHTS.

Any attempt by the Commission to compel the owners of multi-unit buildings to allow access to, and occupation of, their buildings by third-party telecommunications providers and their facilities would violate the owners' rights under the Fifth Amendment. Involuntary emplacement of wires would be "taking" within the meaning of the Fifth Amendment subject to the requirement for compensation.[2]

For the Commission to mandate access for telecommunications providers' cables in and on private buildings would be just as

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2/ As the Court said in Ramirez de Arellano v. Weinberger, 240 U.S. App. D.C. 363, 387 n.95, 745 F.2d 1500, 1524 n.95 (1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), "the fundamental first question of constitutional right to take cannot be evaded by offering 'just compensation'."

unconstitutional as the New York statute that the Supreme Court held to be unconstitutional because it permitted TelePrompTer to run its coaxial cables in and on Mrs. Loretto's apartment building in New York City. See Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419 (1982).

A. Commission-mandated Wiring of Private Buildings Would be an Impermissible "Permanent Physical Occupation."

The physical requirement that a landlord permit a third party to occupy space on the landlord's premises and to attach wires to the building plainly crosses that clear, bright line between permissible regulation and impermissible takings.

Where the "character of the governmental action," the Supreme Court has said, "is a *permanent physical occupation* of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, supra, at 434-35 (emphasis supplied), citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).[3]

3/ In Penn Central the Supreme Court had observed that there was no "set formula" for determining whether an economic taking had occurred and that the Court must engage in "essentially ad hoc, factual inquiries" looking to factors including the economic impact and the character of the government action. No such detailed inquiry is required *where there is a permanent physical occupation.* Id. at 426.

B. Forced Carrier Access Satisfies the Legal Test for an Unconstitutional Taking.

No *de minimis* test validates physical takings. The size of the affected area is Constitutionally irrelevant. In Loretto, supra, at 436-37, the Court reaffirmed that the "the rights of private property cannot be made to depend on the size of the area permanently occupied." Id. at 436-37.

The access contemplated by the Commission notice is legally indistinguishable from the method or use of intrusion in Loretto, where the Court found a "permanent physical occupation" of the property where the installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the buildings' exterior wall. Id. at 438.

Loretto settles the issue that government-mandated access to a private property by third parties for the installation of telecommunication wires and hardware constitutes a taking, regardless of the asserted public interest, the size of the affected area, or the uses of the hardware. In takings there is no constitutional distinction between state regulation (Loretto) and federal regulation (FCC proposed rulemaking).

C. "Just Compensation" for the Taking Requires Resort to Market Pricing.

The takings objection to Commission-mandated access to private property cannot be avoided by requiring the telecommuni-

cations benefitted thereby to make a nominal payment to the owner for access. In Loretto the New York statute at issue provided for a one-dollar fee payable to the landlord for *damage* to the property. The Court concluded that the legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the constitution.

While Loretto does not address the question of whether the invalidity of a taking is avoided by payment from a third party, other courts have held that takings to benefit a private telecommunications provider are subject to heightened scrutiny. See Lansing v. Edward Rose Associates, 442 Mich. 626, 639, 502 N.W. 2d 638, 645 (1993). AMTRAK's condemnation and conveyance of the Boston & Maine's Connecticut River railroad tracks to the Central of Vermont Railroad after payment of compensation was narrowly upheld on the technicality that the condemnation was under the adjudicatory oversight of the Interstate Commerce Commission. Nat'l R.R. Passenger Corp. v. Boston & Maine, 503 U.S. 407, 112 S.Ct. at 1403-04 (1992). That degree of governmental involvement is not contemplated here.

The practical point is this, viz., that the Commission cannot prescribe a nominal amount as compensation for access -- the affected property owner is constitutionally entitled to compensation measured against fair market value. See U.S. v. Commodities Trading Corp., 339 U.S. 121, 126 (1950) (current market value); Bell Atlantic, supra, at 337 n.3, 24 F.3d at 1445

n.3. Is ascertainment of the disputed market values of differing impingements on large numbers of highly diverse commercial and residential properties something that either the Commission or the courts are ready to handle?

III. CONGRESS DID NOT GIVE THE COMMISSION POWER TO COMPENSATE OWNERS FOR TELECOMMUNICATIONS CABLE EMPLACED ON THEIR PROPERTY WITHOUT THEIR CONSENT.

A. Congress Did Not Give the Commission the Power of Eminent Domain.

As the D.C. Circuit made clear in Bell Atlantic, supra, the Congress did not confer the power of eminent domain on either the Commission or its regulatees. Indeed, even in the former Post Roads Act,[4] Congress itself made no attempt to confer such authority on telecommunications providers. In City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92, 13 S. Ct. at 488-89 (1893), the Court made it perfectly clear that even Congressional authorization of carriers' use of public rights-of-way did not carry with it the power to take non-federal property without compensation. See Western Un. Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904), *citing* Western Un. Tel. Co. v. Ann Arbor Ry., 178 U.S. 239 (1900).

Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate

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3/ The Post Roads Act of 1866, R.S. 5263, et seq., as amended, formerly classified to 47 U.S.C. §§ 1 et seq., was repealed by the Act of July 16, 1947, 61 Stat 327.

judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in a U.S. district court under 28 U.S.C. § 1358. Commenters have found no other section of the U.S. Code that would authorize the Commission to deviate from the prescribed procedure.

B. Congress Did Not Give the Commission Implied Authority to Expose the Government to Fiscal Liability in the Court of Federal Claims.

The Commission's lack of explicit statutory authority to take private property cannot be rectified by a reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the Federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. Since the Constitution, Art. I, §§ 8 and 9, assigns to Congress the exclusive control over appropriations, the courts have required a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money, such as an award of just compensation in the instance of a taking of private property for public use as required under the Fifth Amendment to the Constitution.

The D.C. Circuit in Bell Atlantic, supra, declared that where an administrative application of a statute constitutes a taking for an identifiable class of cases, the courts must construe the statute to defeat such constitutional claims wherever possible. The court further made clear that such a

narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations. In so doing, the court rejected the traditional deference accorded to administrative agency interpretations as required by the Supreme Court in Chevron v. N.R.D.C., 487 U.S. 837 (1984), on the grounds that such deference would provide the Commission with limitless power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U. S. Treasury.

In fact, the legislative history of Section 621(a)(2) of the 1984 Cable Act, 47 U.S.C. § 541(a)(2), allowing cable operators to use -- upon payment of defined compensation -- compatible utility easements across private property, shows that Congress had not intended to give the Commission power to mandate access to multi-unit buildings generally. In 1984 the House deleted from H.R. 4103, as reported, the section of the cable bill that would have directed the Commission to promulgate regulations guaranteeing cable access to multiple-unit residential and commercial buildings and trailer parks.

In Media General Cable of Fairfax v. Sequoyah Condominium, 991 F.2d 1169 (1993), aff'g 737 F.Supp. 903 (E.D. Va. 1989), the Fourth Circuit refused to extend Section 621(a)(2) to the installation of cable wires in compatible private easements in common areas of a condominium. Such a construction, the court said, joining the Eleventh Circuit's view earlier in Cable

Holdings, infra, would make Section 621(a)(2) equivalent to the section of the bill that became the 1984 Cable Act that Congress deleted. The court went on to agree that, under such facts, Section 621(a)(2) would be indistinguishable from the New York statute in Loretto. Id. at 1175. The Fourth Circuit also recognized that it had a duty to "avoid any interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction." Id. at 1174-75.

Other courts have also narrowly construed Section 621(a)(2) of the Cable Act. In Cable Holdings v Georgia v. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir. 1992), reh'r'g en banc denied, 988 F.2d 1071 (1992), cert. denied, 506 U.S. 862 (1992), which raised the issue of a cable franchisee's right to access privately owned residential rental property, the Eleventh Circuit Court held that unless Congress provided for a taking under the Fifth Amendment "with the clearest of language", the court would not construe the statute in a manner which raised such constitutional issues. Where the language of Section 621(a)(2) regarding use of private easements by cable franchisees was ambiguous, the court construed it as requiring access to privately owned easements only in cases where private rental property owners had generally dedicated such easements to public use. The court, citing the long-standing canon governing judicial interpretation of statutes so as to avoid raising constitutional issues, determined that such an alternative

interpretation would avoid raising the Fifth Amendment takings issues which were implicated in this case.

Similarly, in Cable Investments v. Woolley, 867 F.2d 151 (1989), the Third Circuit, in reaching a decision on the same issue of whether the Section 621(a)(2) effected a taking, found Congress had considered and rejected a provision that would have required access to privately owned multi-family buildings or trailer parks for purposes of installing cable wiring, thereby effecting a taking for which just compensation would be required. The court held that where Congress specifically considered a mandatory access provision and such provision was deliberately omitted in the final version of the Cable Act to avoid a taking, there was no Congressional intent to support takings of private property. Id. at 156-57, *citing* 130 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (floor statement of Cong. Fields).

In Century SW Cable TV v. CIIF Associates, 33 F.3d 1068 (1994), the Ninth Circuit, following Woolley, reversed the trial court's application of Section 621(a)(2), because there was no evidence of an express dedication. The court found that installation of cable to individual units constituted a physical invasion under Loretto that was not authorized by the statute. Accord, TCI of North Dakota, v. Shriock Holding Co., 11 F.3d 812 (8th Cir. 1993).

The kind of forced building access contemplated here would largely replicate the provisions for forced building access in S.

1822 in the 103d Congress for forced building access, which died on the floor of the Senate in the fall of 1994. Such provisions would not have been needed if the Commission already had that authority.

Given the lack of any clear intent by Congress to provide for takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has been sensitive to such issues, courts are unlikely to uphold the authority of the Commission to promulgate any rules on inside wiring that will effect a taking of private property, thereby subjecting the Government to liability for just compensation.

The general rule on implied takings is similarly given full effect in Exec. Order 12630, 5 U.S.C. § 601n (1988). Executive Order 12630 ("Governmental Actions and Interference with Constitutionally Protected Property Rights") requires executive department agencies to review all federal proposed rulemakings, final rulemakings, legislative proposals, and policy statements that, if implemented, could effect a taking under the Fifth Amendment, in order to protect the U.S. Treasury against unnecessary claims for just compensation. "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," published by the Attorney General in June 1988 to implement such Executive Order, requires subject federal agencies to conduct a predecisional Takings Impact Analysis (TIA). The TIA, in part, requires both an assessment of whether the rule or policy in

question would effect a taking and also an analysis of alternative policies or rules that would be less intrusive on the rights of private property owners. See generally CIT Group v. U.S., 24 Cl. Ct. 540, 543 (1991).

Section V of the Attorney General's guidelines contains an analysis of "the general principles and assessment factors which inform considerations of whether a takings implication exists". Op.cit. at 11. The guidelines warn that "as a general rule where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis." Id at 13, *citing* Loretto in App. at 6.

C. Any Commission Attempt to Condemn Private Property Would be Unlawful under the Anti-Deficiency Act.

Even if the Commission had Congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

> (A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id. A copy of that section is printed full as Attachment 1 hereto.

The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. Since the Act applies to "any officer or employee of the United States Government," it applies to all branches of the federal government, legislative and judicial, as well as executive. See 27 Op. Att'y Gen. 584, 587 (1909) (applying the Act to the Government Printing Office). The Comptroller General of the United States has interpreted the term "obligations" broadly and has opined that actions under the Anti-Deficiency Act include not just recorded obligations but also "other actions which give rise to Government liability and will ultimately require expenditure of appropriated funds." 55 Comp. Gen. 812, 824 (1975). The Comptroller General has set forth as examples of such other actions those which "result in Governmental liability under clear line of judicial precedent, such as through claims proceedings." Id.

Furthermore, the Comptroller General has said that violation of the Act does not depend on an official's wrongful intent or lack of good faith since such a requirement would in effect make the Act null and void. The extent to which there are factors beyond an agency's control in creating obligations which exceed its appropriations level is considered by the Comptroller General in determining violations of the Act. The greater the control that the agency possesses with respect to such obligation, the greater the risk of violating the Act.

The courts have relied on potential violations of the Anti-Deficiency Act in narrowly construing actions by executive officers that might otherwise have exposed the government to unlimited liability. Only weeks ago, the Supreme Court affirmed the Comptroller General's interpretation that the Anti-Deficiency Act is violated where a government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. In Hercules v. U.S., 64 U.S.L.W. 4117, 4120 & n.9 (1996), the Court rejected the government contractor's argument of an implied-in-fact indemnity contract, in part on the grounds that the Anti-Deficiency Act bars any government official from entering into contracts for which no appropriations have been made (as in the case at issue) or for which payment exceeds existing appropriations. The Court also reiterated that contracts for such open-ended liability have been repeatedly rejected by the Comptroller General.

Certainly, a rulemaking which exposes the Government to the inevitable filing of claims founded in the Fifth Amendment subjects the Government to the kind of open-ended liability that has been rejected by the Comptroller General and the courts as a violation of the Anti-Deficiency Act and subject to precautionary procedures under Executive Order 12630.

IV. AS A MATTER OF POLICY, THE COMMISSION SHOULD NOT ATTEMPT TO REGULATE ACCESS TO PRIVATE PROPERTY.

There are sound and persuasive reasons why the Commission should not attempt to regulate access to private property, even if it had jurisdiction to do so. First, there is a thriving, competitive market for real estate in this country, which is fully capable of meeting, and is responsive to, the needs of building occupants. Second, Commission regulation would interfere with the on-the-spot management needed to effectively address safety and security concerns, assure compliance with building and electrical codes, coordinate the needs of different tenants and service providers, and in general oversee the efficient day-to-day operations of hundreds of thousands of buildings.

A. Commission Intervention is not Needed Because the Market is Already Providing Building Occupants with the Services They Need.

Owners, managers, and investors in the nation's commercial and residential buildings already are feeling the reverberations of the telecommunications revolution. Owners are constantly reminded by market demands (as well as a barrage of industry educational materials) that the failure to grant access to the most-advanced telecommunications will cost them dearly in lost tenants and lost opportunities.

1. Telecommunications is a Factor in Building Marketability.

By way of background, businesses typically locate their offices in buildings, and because many businesses depend on access to cutting-edge communications technology, real estate necessarily functions as a part of the on- and off-ramp used by business to travel the information highway. Since technology is constantly changing and, with it, building users' (i.e., our tenants') demand for new products and services, buildings must be equipped to accommodate today's -- and tomorrow's -- telecom traffic. The decisions that any building owner (commercial or residential) makes regarding the building infrastructure are made within the context of what will make the real estate marketable to the best possible tenants, those that pay market rents and stay for predictable sustained terms.

In the regulated monopoly-controlled markets of the not-too-distant past the economics and management of telecommunications services in the real estate context were simple, if unexciting. Risks to building owners were limited but so were opportunities to make investments in telecommunications infrastructure that could yield competitive advantages. When tenants needed telephone installation or maintenance services, the Bell companies took care of it. The provision of cable television services was similarly straight-forward and predictable. These monopoly providers were common carriers with social responsibilities factored into their rates. In return for providing